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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 LINDA GUERRERO,
12 Plaintiff,
13 v.
14 CAROLYN W. COLVIN, Acting
15 Commissioner of Social Security,
16 Defendant.
17
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19

Case No.: 3:16-cv-01229-WQH-NLS

**REPORT AND
RECOMMENDATION FOR ORDER:**

**(1) DENYING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT [Dkt. No. 16]; and**

**(2) GRANTING DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT [Dkt. No. 21].**

20 Linda Guerrero (“Plaintiff”) brings this action under the Social Security Act. *See*
21 42 U.S.C. § 405(g). Plaintiff seeks judicial review of the Social Security
22 Administration’s (“Defendant”) final decision denying her claim for Supplemental
23 Security Income benefits under Title XVI of the Act. This case was referred for a report
24 and recommendation on the parties’ cross motions for summary judgment. *See* 42 U.S.C.
25 § 636(b)(1)(B). After considering the papers submitted, the administrative record, and
26 the applicable law, the Court **RECOMMENDS** that Plaintiff’s motion for summary
27 judgment and for reversal or remand be **DENIED** and that Defendant’s cross motion for
28 summary judgment be **GRANTED**.

1 **I. BACKGROUND**

2 **A. Procedural History.**

3 On July 23, 2012, Plaintiff filed an application for Supplement Security Income
4 (“SSI”) under Title XVI of the Social Security Act. She alleges a disability onset date of
5 August 20, 2007. AR 124-29, 140.

6 The Commissioner denied Plaintiff’s claim initially and on reconsideration. AR
7 74-78, 86-92. She requested a hearing before an Administrative Law Judge (“ALJ”).
8 The ALJ held a hearing on September 17, 2014. Plaintiff was represented by counsel at
9 the hearing. Plaintiff’s counsel stated that Plaintiff returned to gainful employment on
10 September 1, 2013, and thus she amended her SSI claim to reflect a “closed application
11 period.” Plaintiff seeks benefits solely for the period starting on July 23, 2012 (the date
12 she filed the application) through September 1, 2013 (the date she returned to work). AR
13 37-38.

14 On November 20, 2014, the ALJ issued a decision. He found Plaintiff was not
15 under a disability from July 23, 2012 through September 1, 2013. AR 20-28. On March
16 3, 2015, the Appeals Council denied Plaintiff’s request for review, making the ALJ’s
17 decision the final decision of the Commissioner for judicial review purposes. AR 1-4.
18 Plaintiff timely commenced this action in federal court.

19 **B. Plaintiff’s Background.**

20 Plaintiff was born on October 6, 1962. AR 131. The highest grade in school she
21 completed was the twelfth grade. AR 148. In a disability report, Plaintiff stated she
22 worked in customer service in the retail industry from 1998 through 2011, working six
23 hours per day for five days per week. AR 147. She assisted customers, stocked product,
24 and served as a cashier. AR 148. In 2007, she suffered a work-related injury to her back.
25 AR 210, 228.

26 Plaintiff claims that she suffers from back problems due to surgery and severe pain
27 in her left leg, and that these conditions limit her ability to work. AR 146. She also
28 claims she suffers from carpal tunnel syndrome. AR 286.

1 **C. Medical Evidence in the Record.**

2 **1. Plaintiff's Previous Work-Related Injury (2007).**

3 On January 6, 2007 Plaintiff suffered a work-related injury to the lumbo-sacral
4 junction while at the Navy Exchange. AR 210, 228. She received epidural steroid
5 injections for lumbar radiculopathy in spring 2007. She underwent surgery for a spinal
6 fusion L-5-S1 with laminectomy on August 29, 2007. AR 222, 228. She also had a
7 transforaminal epidural steroid injection in February of 2008. AR 217.

8 **2. Workers' Compensation Primary Treating Physician Dr. Tayyab**
9 **(2008).**

10 On March 31 2008, Dr. Neil Tayyab issued a primary treating physician's
11 permanent and stationary report. AR 227. He reviewed Plaintiff's workplace injury,
12 injection procedures and surgery. He reported that the "surgery went quite well and
13 postoperatively she was walking around very nicely and had significantly reduced low
14 back pain and also did not complain to any leg pain." AR 228. But a few weeks later,
15 Plaintiff began experiencing pain in her lower left leg. *Id.* Dr. Tayyab then tried a
16 number of ultimately unsuccessful methods to treat and decrease the pain. He opined that
17 Plaintiff reached her maximum medical improvement and a permanent and stationary
18 status regarding her lumbar spine. AR 230. He opined she should not push or pull more
19 than 10 pounds, should not repetitively bend or twist, and should not stand or walk for
20 more than 30 minutes at one time—or for more than two hours total—in an eight-hour
21 workday. AR 230.

22 In May 2008 Dr. Tayyab opined that Plaintiff had reached maximum medical
23 improvement, could only work four hours per day, and would not be able to work an
24 eight-hour workday for at least three-to-six more months. AR 238. In August of 2008,
25 he opined Plaintiff could still only work four hours per day and would not be able to
26 work an eight-hour workday for three more months. He opined Plaintiff's daily
27 limitations included sitting for four hours, standing for one hour, walking for one hour,
28 and reaching and using her wrists and elbows for up to eight hours. AR 237.

1 **3. Dr. Sabourin's Report – Consultative Orthopedist (May 2013).**

2 Dr. Sabourin did a consultative exam of Plaintiff regarding the reported pain in her
3 neck, left wrist, upper back, lower back, hips, knees and ankles. AR 253-257. Plaintiff
4 drove herself to the appointment. AR 253. She reported that she had neck pain for two
5 years, saw a doctor for it, and the doctor just told her to take Tylenol. *Id.* She did not
6 have any workup done for the pain in her left wrist and hand. *Id.* Plaintiff received a
7 lumbar fusion in August 2007. *Id.* Dr. Sabourin reported normal posture and gait,
8 normal range of motion for the neck, pain with left lateral flexion, no spinal deformities
9 or spasms. AR 254. As for her wrists, there was slight tenderness in the left wrist but no
10 redness or swelling. AR 255. She tested negative for Tinel's and Phalen's tests. *Id.* Her
11 left leg was also tender but without any inflammation in the joints, or redness, swelling or
12 instability. *Id.*

13 Based on his examination Dr. Sabourin concluded that Plaintiff could lift, carry,
14 push or pull 20 pounds occasionally and 10 pounds frequently, could stand, sit or walk
15 for six hours out of an eight-hour day, could climb, stoop, kneel and crouch occasionally,
16 and had no manipulative limitations or need for assistive devices to ambulate. AR 256.

17 **D. Vocational Evidence.**

18 **1. Plaintiff's Past Work.**

19 In a disability report Plaintiff stated she worked in customer service in the retail
20 field from 1998 to 2011. AR 147. The detailed earnings query shows Plaintiff worked at
21 Macy's in 1998, at the Navy Exchange Service Command in 2000, at Macy's in 2003,
22 and at J C Penney's in 2004. AR 134. Plaintiff worked at the Navy Exchange in 2005,
23 and then at the Navy Exchange and Kohl's Department Stores in 2006.

24 In January of 2007, while working at the Navy Exchange, Plaintiff sustained a
25 workplace injury. AR 135, 210, 228. The detailed earnings query does not show any
26 reported earnings for 2008 and 2009. AR 135.

27 The detailed earnings query also shows Plaintiff worked at the Marine Corps
28 Community Services, Marine Corps base in 2010. AR 50, 135. Plaintiff stated in a

1 disability report that she was laid off from work for reasons unrelated to her alleged
2 impairments in April of 2011. AR 146-147; Exs. 5D, 7E. The detailed earnings query
3 does not show any reported earnings for 2012 and 2013. But Plaintiff testified at the
4 hearing that on September 1, 2013, she began working again as a cashier at Purdy's. AR
5 41-42, 48.

6 **2. Vocational Expert Testimony.**

7 Vocational Expert John Kilcher testified at the hearing. AR 46. He reviewed the
8 file and exhibits to acquaint himself with Plaintiff's vocational background. *Id.* He
9 characterized Plaintiff's vocational background as a Customer Service Clerk at the light
10 level, semi-skilled, SVP 4. AR 47. He testified that an individual with Plaintiff's
11 background in age, education and work experience—who was limited to light work and
12 to only occasional postural activities but able to do frequent bilateral handling and
13 fingering—would be able to return to her past work. *Id.* He also characterized Plaintiff's
14 work as Retail Customer Service, light level, semi-skilled, SVP of 3. AR 49.

15 Upon questioning by Plaintiff's attorney Mr. Kilcher testified that an individual
16 who is limited to lifting no more than 10 pounds and standing and walking no more than
17 two hours out of an eight hour day would not be able to do their past work or any other
18 work at the light level; any work would have to be sedentary. AR 49.

19 **E. Plaintiff's Testimony at the Hearing.**

20 Plaintiff testified that she could not work during her alleged period of disability
21 because of pain, tingling, and numbness in her left leg and pain due to carpal tunnel in
22 her hands. AR 39. She testified that during the period she could not work, she could
23 only be on her feet for 15 to 20 minutes before it began to hurt, could only sit for about
24 20 minutes because her lower back hurt, and at most could lift 10 pounds. AR 45.

25 Plaintiff also testified about her daily activities. She said that she could wash her
26 hair, feed herself, dress and tie her shoes "at a certain level." AR 40. When asked what
27 she meant by "a certain level," she clarified that though she would bend over to tie her
28 shoe, it would cause pain because of her back surgery. *Id.* She said she could tie her

1 shoes “here and there,” and that she did not use buttons or clasps to fasten her bra. *Id.*
2 She testified she could not drive a car because of the pain in her left leg, and her son
3 drove her around. AR 40-41, 45. She would cook meals using a microwave, and her son
4 would cook and bring her food. *Id.* Her son did her laundry for her. AR 41.

5 When the ALJ asked why she believed she could not work in July of 2012,
6 Plaintiff’s attorney clarified that Plaintiff alleged a disability onset date of 2007 and that
7 July 23, 2012 is only her SSI application date. AR 43. The ALJ then asked Plaintiff if
8 she asserts she has not been able to work since 2007 because of her back, to which
9 Plaintiff responded yes. AR 43. Later, the ALJ noted that Plaintiff’s earnings records
10 showed she worked in 2010. AR 50. He asked where she worked during that time
11 period. *Id.* Plaintiff’s attorney noted that she worked at the Marine Corps Community
12 Services, and Plaintiff stated she worked part-time as a cashier at that time. *Id.*

13 Plaintiff then testified that her hands began to hurt around 2012. *Id.* She testified
14 she did not do any physical therapy on her hands and that she saw a doctor who twice
15 told her he would order a brace for her hands. AR 44. But she never obtained the brace
16 and the doctor gave her Ibuprofen and muscle relaxers instead. *Id.*

17 **II. THE ALJ’S DECISION**

18 **A. The Sequential Process.**

19 To qualify for disability benefits under the Social Security Act, an applicant must
20 show that he or she cannot engage in any substantial gainful activity because of a
21 medically determinable physical or mental impairment that has lasted or can be expected
22 to last at least 12 months. 42 U.S.C. § 1382c(a)(3). The Social Security regulations
23 establish a five-step sequential evaluation to determine whether an applicant is disabled
24 under this standard. 20 C.F.R. § 416.920(a).

25 At step one, the ALJ determines whether the applicant is engaged in substantial
26 gainful activity. 20 C.F.R. § 416.920(b). If not, then at step two the ALJ must determine
27 whether the applicant suffers from a severe impairment or a combination of impairments.
28 *Id.* § 416.920(c). If the impairment is severe, at step three the ALJ must determine

1 whether the applicant's impairment or combination of impairments meets or equals an
2 impairment contained under 20 C.F.R. Part 404, Subpart P, Appendix 1. *Id.* §
3 416.920(d). If the applicant's impairment meets or equals a listing, he or she must be
4 found disabled. *Id.*

5 If the impairment does not meet or equal a listing, the ALJ must determine the
6 applicant's residual functional capacity. Then, the ALJ must determine at step four
7 whether the applicant retains the residual functional capacity to perform past relevant
8 work. *Id.* § 416.920(f). If the applicant cannot perform past relevant work, at step five
9 the ALJ must consider whether the applicant can perform any other work that exists in
10 the national economy. *Id.* § 416.920(g).

11 The applicant carries the burden to prove eligibility from steps one through four
12 but the burden at step five is on the agency. *Celaya v. Halter*, 332 F.3d 1177, 1180 (9th
13 Cir. 2003). Applicants not disqualified at step five are eligible for disability benefits. *Id.*

14 **B. Substance of the ALJ's Decision.**

15 At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity
16 from July 23, 2012 through September 1, 2013. AR 22. At step two, the ALJ found
17 Plaintiff's back disorder and carpal tunnel syndrome constituted severe impairments. *Id.*
18 At step three, the ALJ found Plaintiff did not have an impairment or combination of
19 impairments that would meet or medically equal any listed impairments. The ALJ next
20 found Plaintiff has the residual functional capacity to perform light work as defined in 20
21 C.F.R. 416.927(b), except she can occasionally perform postural activities and can do
22 frequent fingering and handling with the bilateral upper extremities. AR 23. At step
23 four, the ALJ found Plaintiff could perform her past relevant work as a customer service
24 clerk and as a retail sales clerk. AR 27. The ALJ further stated that this past relevant
25 work does not require her to perform work-related activities precluded by her residual
26 functional capacity. *Id.* The ALJ concluded Plaintiff was not under a disability as
27 defined in the Social Security Act since July 23, 2012, the date she filed her application,
28 through September 1, 2013.

1 **III. LEGAL STANDARD**

2 The Social Security Act provides for judicial review of a final agency decision
3 denying a claim for disability benefits. 42 U.S.C. § 405(g). A reviewing court must
4 affirm the denial of benefits if the agency’s decision is supported by substantial evidence
5 and applies the correct legal standard. *Id.* Substantial evidence means “such relevant
6 evidence as a reasonable mind might accept as adequate support to support a conclusion.”
7 *Morgan v. Comm’r Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 2003). When the
8 evidence is susceptible to more than one reasonable interpretation, the ALJ’s conclusion
9 must be upheld. *Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir.
10 2004). It is not the court’s job to reinterpret or re-evaluate the evidence, however much a
11 re-evaluation may reasonably result in a favorable outcome for the plaintiff. *Id.*

12 **IV. DISCUSSION**

13 **A. Whether Plaintiff’s Past Relevant Work Amounted to Substantial** 14 **Gainful Activity.**

15 At step four, the ALJ concluded that Plaintiff performed past relevant work.
16 Past relevant work is defined as “work that you have done within the past 15 years, that
17 was substantial gainful activity, and that lasted long enough for you to learn to do it.” 20
18 C.F.R. § 416.960(b)(1). An individual engages in substantial gainful activity if she does
19 significant physical or mental activities for pay or profit. 20 C.F.R. § 416.972.
20 Generally, if an individual has earnings from employment or self-employment above a
21 specific level set out in the regulations, it is presumed she demonstrated the ability to
22 engage in substantial gainful activity. 20 C.F.R. § 416.974. Here, the ALJ found that
23 Plaintiff performed the work within 15 years of the date of the ALJ’s decision for a
24 sufficient length of time to learn and provide average performance, and did so “at the
25 level of substantial gainful activity.” AR 28.

26 Plaintiff argues the ALJ’s conclusion at step four is not supported by substantial
27 evidence because the record does not demonstrate a level of “substantial gainful activity.”
28 Dkt. 16-1 at 10-12. Specifically, she argues that her past earnings did not meet the

1 monthly minimum monetary amount set in the regulations. *Id.* Defendant argues that
2 Plaintiff waived the substantial gainful activity argument because she failed to raise it in
3 the underlying proceedings, and that in any event, substantial evidence supports the
4 ALJ’s finding of substantial gainful activity. Plaintiff does not counter the waiver
5 argument but says this court should review the issue because the ALJ cited to the
6 earnings record and earnings query in his decision.

7 Plaintiff was represented by counsel at the administrative hearing and on appeal to
8 the Appeals Council. Social Security claimants, when represented by counsel, “must
9 raise all issues and evidence at their administrative hearings in order to preserve them on
10 appeal.” *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir.1999). That is because the ALJ,
11 rather than the district court, is “in the optimal position” to evaluate the evidence and
12 apply it to the law. *Id.* The court will “only excuse a failure to comply with this rule
13 when necessary to avoid a manifest injustice[.]” *Id.* A manifest injustice occurs when a
14 plaintiff did not have a “reasonable basis for thinking that there was a conflict at the time
15 of the hearing.” *Padlo v. Berryhill*, 2017 WL 735734, *5 (E.D. Cal. Feb. 24, 2017)
16 (finding a manifest injustice would arise where counsel did not have an advance
17 opportunity to study the jobs the vocational expert cited for possible inconsistencies with
18 the ALJ’s hypotheticals).

19 If an issue is raised before the ALJ but not with the Appeals Council that issue is
20 not waived in the district court. *Sims v. Apfel*, 530 U.S. 103, 112 (2000); *Edlund v.*
21 *Massanari*, 253 F.3d 1152, 1160 n.9 (9th Cir. 2001). And if an issue is raised before the
22 Appeals Council but not with the ALJ that issue is likewise not waived in the district
23 court. *Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012). But
24 if an issue for which the plaintiff bears the burden of proof is not raised before either the
25 ALJ or the Appeals Council, and the claimant—who was represented by counsel—had a
26 reasonable opportunity to raise it, the issue is waived. *See Simpson v. Colvin*, 2016 WL
27 3091487, *1 (C.D. Cal. May 31, 2016) (explaining the nuances of the case law on waiver
28 in a social security case); *see Brewer v. Colvin*, 2016 WL 4491498, *4 (C.D. Cal. Aug.

1 24, 2016) (finding that if an issue arises under Step 5 where the Commissioner bears the
2 burden of proof the plaintiff's failure to raise it with the ALJ or before the Appeals
3 Council is not a waiver because the ALJ's ruling could not have been anticipated).

4 Here, Plaintiff carried the burden at Step 4 of showing that she did not retain the
5 residual functional capacity to perform past relevant work. 20 C.F.R. § 416.920(b);
6 *Celaya*, 332 F.3d at 1180. The Administrative Record included Plaintiff's earnings
7 records, which showed that her annual earnings ranged from \$581.15 to \$7688.51 for the
8 years she actually worked between 1999 and 2014. AR 137. It also included her
9 disability report, where she reported that she earned \$8.25 per hour, while working six
10 hours per day for five days a week. AR 147. Plaintiff's attorney reviewed her earnings
11 record and discussed it at the hearing. But she never even mentioned that her past work
12 did not demonstrate substantial gainful activity:

13 **Examination of Vocational Expert by Claimant's Attorney**

14 Q: I noticed in her earnings record she's always working at
15 retail stores like Macy's or Old Navy. Was there a
reason that you just didn't use retail sales clerk?

16 ***

17 Q: Okay, if I am going to do a hypothetical individual, I'm
18 going to use...the treating source's opinion, and I limit
19 that individual to limit no more than 10 pounds, standing
and walking no more than two hours out of an eight hour
20 day. **Is this individual able to do their past work or
any other work at the light level?**

21 A: No, they could not. That would be at a sedentary type
22 work.

23 AR 48-49 (emphasis added).

24 Based on the above questioning it appears that Plaintiff advocated for a finding that
25 the earnings constituted substantial gainful activity because her question centered on
26 whether Plaintiff could return to her past work. Further, Plaintiff's counsel did not object
27 to the ALJ asking about Plaintiff's current capabilities given her past work experience:

28 ///

1 Q: Do you have enough information to characterize Ms.
2 Guerrero's vocational background?

3 A: Yes I do. She worked as a customer service
4 clerk...Classified at the light level and that's how the
5 claimant had performed it and it's semi-skilled....That's
6 all her past work.

7 Q: So, that's light and.

8 A: Semi-skilled.

9 Q: Semi-skilled. If we were to assume an individual similar
10 to Ms. Guerrero in age, education, and work experience
11 that was, excuse me, limited to light work. Further
12 limited to only occasional postural activities, and
13 frequent bilateral handling and fingering **would that**
14 **individual be able to return to Ms. Guerrero's past**
15 **work?**

16 A: Yes, they could.

17 Q: **And would there be other work as well?**

18 A: **Yes, there would be.**

19 Q: And could you characterize for us the cashier work that
20 Ms. Guerrero is doing now?

21 ***

22 A: Okay. Her job would be classified as cashier II ...at the
23 light level. And unskilled.

24 AR 47-48 (emphasis added).

25 The ALJ's questioning to the Vocational Expert centered on Plaintiff's ability to
26 perform past relevant work. AR 46-50; *see* AR 23 (assessing Plaintiff as retaining the
27 residual functional capacity to perform a limited range of light work). If Plaintiff had no
28 past relevant work because she did not have any substantial gainful activity, the ALJ's
examination would have focused on whether Plaintiff could perform any other work that
exists in the national economy. 20 C.F.R. § 416.920(g). Plaintiff's counsel did not
object to the ALJ's examination based on ability to return to past work.

In sum, Plaintiff's counsel at the hearing expressly admitted that she reviewed
Plaintiff's earning records. She herself questioned Plaintiff regarding her past work. She
did not object to the ALJ's questioning regarding past work. If Plaintiff in fact wanted to
argue that she had no past relevant work it was her burden to do so. She had the notice

1 and the opportunity to address it at the administrative hearing and in the Appeals Council
2 filing. She did neither. The court, therefore, finds that Plaintiff waived this issue, and
3 that no manifest injustice can occur from this finding of waiver because Plaintiff had a
4 “reasonable basis for thinking that there was a conflict at the time of the hearing.” *Padlo*,
5 2017 WL 735734, at *5; *see Phillips v. Colvin*, 593 Fed.Appx. 683, 684 (9th Cir. 2015)
6 (finding that Plaintiff’s failure to challenge a finding that he engaged in substantial
7 gainful activity was waived when he failed to raise it at the administrative level through
8 counsel and did not demonstrate a manifest injustice excusing the failure).

9 **B. Whether The ALJ Properly Considered Plaintiff’s Testimony and**
10 **Statements.**

11 A claimant’s subjective symptoms must be considered in a disability evaluation.
12 20 C.F.R. § 404.1529; *Smolen v. Chater*, 80 F.3d 1273, 1291 (9th Cir. 1996). In deciding
13 whether to credit a claimant’s testimony about subjective symptoms or limitations, the
14 ALJ must engage in a two-step analysis. *Batson*, 359 F.3d at 1195; *Smolen*, 80 F.3d at
15 1281. Under the first step, the claimant must produce objective medical evidence of an
16 underlying impairment that could reasonably be expected to produce pain or other
17 symptoms. *Batson*, 359 F.3d at 1195; *Smolen*, 80 F.3d at 1281. If this test is satisfied,
18 and there is no affirmative evidence that the claimant is malingering, then the ALJ must
19 determine the credibility of the claimant’s subjective complaints. At the second step, the
20 ALJ may reject the claimant’s testimony about the severity of symptoms as long as he
21 gives specific, convincing reasons for doing so. *Batson*, 359 F.3d at 1195; *Lingenfelter v.*
22 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). “General findings are insufficient; rather,
23 the ALJ must identify what testimony is not credible and what evidence undermines the
24 claimant's complaints.” *Lester*, 81 F.3d at 834.

25 Here, the ALJ found that Plaintiff’s medically determinable impairments could
26 reasonably be expected to cause some of the alleged symptoms. AR 24. But he found
27 Plaintiff’s statements concerning the intensity, persistence and limiting effects of her
28 symptoms were not entirely credible. AR 24. Specifically, they were inconsistent with

1 the medical record and with her reported activities of daily living and work history.
2 Plaintiff argues that substantial evidence does not support the ALJ's finding that Plaintiff
3 is not credible because the ALJ relied on evidence of activities that did not contradict her
4 testimony or did not have any application to a work setting, did not confront her on any
5 inconsistent statements, and drew improper inferences about her truthfulness regarding
6 her work history and failure to seek medical treatment for her symptoms. Dkt. 16-1 at
7 12-14. Defendant argues that the ALJ made specific credibility findings as to why he
8 discredited her testimony and thus, substantial evidence supports his decision.

9 **1. Consistency with the Medical Record.**

10 An ALJ must determine the extent to which a claimant's symptoms "can
11 reasonably be accepted as consistent with the medical signs and laboratory findings and
12 other evidence to decide how [those] symptoms affect [the claimant's] ability to work."
13 20 C.F.R. § 404.1529(a). But those statements alone cannot be decisive on a disability
14 claim. 42 U.S.C. § 423(d)(5)(A) ("[a]n individual's statement as to pain or other
15 symptoms shall not alone be conclusive evidence of disability"); 20 C.F.R. § 404.1529(a)
16 ("statements about your pain or other symptoms will not alone establish that you are
17 disabled").

18 Plaintiff argues that the ALJ failed to compare Plaintiff's testimony with the
19 findings of Dr. Tayyab, the doctor who treated her in 2008 for a workers compensation
20 injury. Dr. Tayyab opined that Plaintiff reached her maximum medical improvement and
21 a permanent and stationary status regarding her lumbar spine and should not stand or
22 walk for more than 30 minutes at one time—or for more than two hours total—in an
23 eight-hour workday. AR 230. In August of 2008, he opined Plaintiff could still only
24 work four hours per day. AR 237. These reports issued approximately four years before
25 Plaintiff's disability application of July 23, 2012.

26 Despite the four-year delay between Dr. Tayyab's findings and the disability
27 application, the ALJ considered Dr. Tayyab's opinion in order to view the record in the
28 light most favorable to Plaintiff. AR 24. The ALJ also cited to other medical evidence

1 and found that Plaintiff's allegations regarding the severity of her symptoms and
2 limitations were diminished in light of the objective evidence in the record. Those cited
3 records include:

- 4 • All radiological findings note that the spinal fusion is stable and the
5 hardware is well placed. AR 25 (citing Exs. 1F, p.42; 3F; 5F, p.62).
- 6 • At times Plaintiff reported no back pain or tenderness in her lumbar spine.
7 AR 25 (citing Ex. 4F, pp. 13, 15-16).
- 8 • Between the time that Dr. Tayyab found Plaintiff had met maximum medical
9 improvement and Plaintiff's application date, she worked part time and
10 reported that she stopped working because she was laid off, as opposed to
11 stopping work due to physical limitations. AR 25 (referring to AR 42, 146).
- 12 • Plaintiff said she did not receive particularly helpful medical treatment but
13 that she was ultimately able to return to work because she had relaxed and
14 taken care of herself. AR 25 (referring to AR 42).
- 15 • Dr. Sabourin, a consultative orthopedist, examined Plaintiff and opined that
16 she could lift and carry 20 pounds occasionally and 10 pounds frequently,
17 could stand, walk and sit for six hours in an eight-hour day, and could
18 occasionally climb, stoop, kneel and crouch, all of which is consistent with
19 Plaintiff's longitudinal treatment record. AR 25-26 (citing Ex. 3F).
- 20 • Dr. Tayyab opined that Plaintiff reached a permanent and stationary status
21 regarding her lumbar spine but she is now working at a functional level that
22 is greater than that status. AR 27.

23 The court finds that the citations to this medical evidence in the record are specific
24 enough to constitute substantial evidence to support the ALJ's credibility finding. *See*
25 *Social Security Ruling 96-7p* (credibility findings "must be sufficiently specific to make
26 clear to the individual and to any subsequent reviewers the weight the adjudicator gave to
27 the individual's statements"). Further, it was appropriate for the ALJ to consider this
28 evidence when assessing Plaintiff's credibility. *See Smolen*, 80 F.3d at 1284 (finding
ALJ can consider objective medical evidence when assessing credibility); *see also Burch*
v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) ("Although lack of medical evidence
cannot form the sole basis for discounting pain testimony, it is a factor that the ALJ can
consider in his credibility analysis").

///

1 Further, the ALJ noted that Plaintiff was twice prescribed a splint for her carpal
2 tunnel but never got one, waited one year in between doctor visits to complain about
3 carpal tunnel, and returned to work three months after she was prescribed a splint for the
4 second time. AR 25 (citing Ex. 4F, pp.22, 26). The ALJ found that her accounts of
5 disabling pain and dysfunction did not correspond with the course of medical treatment
6 regarding carpal tunnel. AR 24. Further, there is no argument or evidence that Plaintiff
7 lacked the medical insurance or funds to follow up on her carpal tunnel or procure a
8 splint, as twice prescribed. The court finds that the ALJ's finding is reasonable here. *See*
9 *Fair v. Bowen*, 885 F.2d 597 (9th Cir. 1989) (finding unexplained failure to seek
10 treatment can cast doubt on sincerity of claimant's testimony); *Stanistreet v. Chater*, 21
11 F.Supp.2d 1129, 1136 (C.D. Cal. 1995) (finding the absence of medical treatment over a
12 nine-month period suggested the claimant's "subjective complaints of worsening
13 symptoms and chronic, disabling pain are exaggerated").

14 In sum, the ALJ points to objective medical evidence that supports his finding that
15 Plaintiff's allegations regarding the severity of her symptoms are greater than what is
16 demonstrated by the objective medical evidence in the record.

17 **2. Consistency with Reported Activities of Daily Living.**

18 The ALJ discredited Plaintiff's testimony because he found it inconsistent with her
19 complaints of disabling symptoms and limitations. AR 24. In assessing the credibility of
20 these subjective complaints, the ALJ may consider the claimant's daily activities.
21 *Tonapetyan v. Halter*, 242 F.3d 1144, 148 (9th Cir. 2001); *Smolen*, 80 F.3d at 1284; 20
22 C.F.R. § 404.1529(c)(3)(i). Differences between a claimant's allegations and her conduct
23 qualifies as substantial evidence that may be used in a credibility determination. *Light v.*
24 *Soc. Sec. Admin*, 119 F.3d 789, 792 (9th Cir. 1997). The court is aware, though, "that
25 ALJs must be especially cautious in concluding that daily activities are inconsistent with
26 testimony about pain, because impairments that would unquestionably preclude work and
27 all the pressures of a workplace environment will often be consistent with doing more
28 than merely resting in bed all day." *Garrison v. Colvin*, 759 F.3d 995 (9th Cir. July 14,

1 2014). But where a level of activity is inconsistent with a claimant's claimed limitations,
2 then the activities bear on a claimant's credibility. *Id.*

3 Here, Plaintiff complained of limitations due to back pain, carpal tunnel and pain
4 in her left leg during the relevant period. AR 39-41. But her daily activities during that
5 time included preparing simple meals, taking care of her three-year-old granddaughter,
6 and living free of any assistance from anyone except for driving and laundry. AR 24, 39-
7 41, 45, 158-160. She also did some housework, grocery shopping and sewing. *Id.*
8 Considering his citations to her reported daily activities, the ALJ's finding that Plaintiff's
9 daily activities were inconsistent with the claimed limitations is reasonable and supported
10 by substantial evidence cited to in the record. Thus, the court may not "second-guess it."
11 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (noting that there may be other
12 reasonable interpretations of a claimant's testimony but that if the ALJ's finding is
13 reasonable and supported by substantial evidence then the court cannot second-guess it);
14 *see Osenbrock v. Apfel*, 240 F.3d 1157, 1166 (9th Cir. 2001) (recognizing a claimant's
15 daily activities were self-limited and a lifestyle choice).

16 **3. Consistency of Statements Regarding Work History.**

17 The ALJ discredited Plaintiff's testimony for her inconsistencies regarding work
18 history. AR 24. For example, at the hearing both she and her attorney said she did not
19 work from 2007 to 2013. AR 24, 42, 43, 44. But then when the ALJ asked her about her
20 earnings record for 2010 where she earned \$7,588, she admitted she had worked as a
21 part-time cashier during that time for the Marine Corps Community Services. AR 50,
22 135. Another earnings record showed that she also worked in 2011, and in her disability
23 questionnaire she reported that she lost that job due to a layoff rather than due to any
24 disability. AR 24 (citing Exs. 5D, 7E, AR 146-147). Even though these activities did not
25 occur during the application period, they indicated to the ALJ that:

26 [Plaintiff's] daily activities have, at least at times, been
27 somewhat greater than the claimant has generally reported.
28 Additionally, the fact that the claimant provided inaccurate
information on a matter so integral to determining disability

1 suggests that much of what the claimant has alleged may be
2 similarly unreliable.

3 AR 24.

4 Plaintiff argues that any inconsistent statements are irrelevant because the ALJ
5 failed to confront Plaintiff about these statements. Relying on immigration cases,
6 Plaintiff argues the ALJ had to find deliberate deception to reject her statements. But that
7 is not the law in Social Security cases, and the court does not condone Plaintiff's attempt
8 to shift the burden of being truthful and consistent to Defendant. *See Thomas v.*
9 *Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (discrediting testimony due to inconsistent
10 statements). Accordingly, the court finds that the ALJ cites to substantial evidence to
11 support his discrediting of Plaintiff's testimony based on her inconsistent statements.

12 **V. CONCLUSION**


13 The court **RECOMMENDS** that Plaintiff's motion for summary judgment be
14 **DENIED** and that Defendant's cross motion for summary judgment be **GRANTED**.

15 This Report and Recommendation is submitted to the United States district judge
16 assigned to this case under 28 U.S.C. § 636(b)(1). Any party may file written objections
17 with the court and serve a copy on all parties by **May 11, 2017**. The document should be
18 captioned "Objections to Report and Recommendation."

19 Any response to the objections shall be filed and served by **May 18, 2017**. The parties
20 are advised that any failure to file objections within the specified time may waive the
21 right to raise those objections on appeal of the Court's order. *Baxter v. Sullivan*, 923 F.2d
22 1391, 1394 (9th Cir. 1991).

23 **IT IS SO ORDERED.**

24 Dated: April 26, 2017

25 
26 Hon. Nita L. Stormes
27 United States Magistrate Judge
28